

Case No. S184583

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

AMERICAN NURSES ASSOCIATION, *et al.*,
Plaintiffs and Respondents

v.

JACK O'CONNELL as Superintendent of
Public Instruction, etc., *et al.*,
Defendants and Appellants

AMERICAN DIABETES ASSOCIATION
Intervenor and Appellant

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND
BRIEF OF *AMICI CURIAE* IN SUPPORT OF INTERVENOR AND
APPELLANT, THE AMERICAN DIABETES ASSOCIATION

On Review From A Published Decision Affirming A Judgment Including
Issuance of A Peremptory Writ of Mandate, Court of Appeal, Third Appellate
District, Appeal No. C061150

On Appeal From A Judgment On A Complaint And A Petition For Writ Of
Mandate, Sacramento County Superior Court, No. 07 AS04631
Honorable Lloyd G. Connelly

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Disability Rights California also contracts with the State of California to serve people with developmental disabilities and people in state psychiatric hospitals. Disability Rights California has extensive experience advocating for children with disabilities in schools and in the community, including representing or counseling thousands of families annually in special education, discrimination, and other school related matters.

The Disability Rights Legal Center (“DRLC”) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with Disabilities Education Improvement Act and other federal and state laws. The DRLC is a recognized expert in the field of disability rights.

Disability Rights Texas (“DRT”) is a non-profit organization designated by the Governor of Texas to protect and advocate for the rights of individuals with disabilities, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15041 et seq., the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 et seq., and the Protection and Advocacy of Individual Rights program, 29 U.S.C. § 794e. In accordance with its federal mandate, DRT has the authority, *inter alia*, to pursue administrative, legal and other appropriate remedies to ensure the protection of rights of persons with disabilities. The agency’s Board of Directors has established case priorities to ensure that students with disabilities receive the support they need to

learn in integrated settings with their non-disabled peers, and to ensure that people with disabilities have full and equal access to government facilities, programs and services.

The Legal Aid Society – Employment Law Center (“LAS-ELC”) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, the LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, and national origin. The LAS-ELC has represented, and continues to represent, clients faced with discrimination on the basis of their disabilities, including those with claims brought under the Americans with Disabilities Act and the Fair Employment and Housing Act (FEHA). The LAS-ELC has also filed *amicus curiae* briefs in cases of importance to disabled persons. Further, the LAS-ELC sponsored the Prudence Kay Poppink Act, passed by the California legislature in 2000, which clarified a number of the disability discrimination provisions in California’s FEHA. The LAS-ELC has particular expertise in the interpretation and application of state and federal disability nondiscrimination statutes.

II. INTERESTS OF AND ASSISTANCE OFFERED BY *AMICI CURIAE*

The *Amici Curiae* are all organizations that serve constituencies directly affected by the outcome of the decision in this case. As non-profit, governmental, and/or advocacy organizations, the *Amici Curiae* have substantial experience working with students who require medication while at school and possess a thorough understanding of the challenges and consequences of protecting the educational rights and ensuring the health and welfare of students with disabilities within a school environment. The

outcome of this case will directly affect how the *Amici Curiae* serve their clients and the quality of educational opportunities available to their clients.

The *Amici Curiae* believe that their respective backgrounds, expertise, interests and views in connection with the issues presented in this case will be helpful in resolving these issues currently before the Court. Based on this background, the *Amici Curiae* will focus on issues not yet briefed in this case – the practical consequences and constitutional violations that arise from refusing to allow trained school personnel who are not licensed nurses to administer medication to students who require it while at school.

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compelling interest, and thus, Section 2725, as interpreted by the appellate court, cannot survive strict scrutiny.²

Moreover, the scope of the problem created by the Court of Appeal's erroneous interpretations is not fully uncovered by the parties' briefs or lower court decisions. Simply put, the practical effect of denying children necessary medication would be disastrous. The purpose of this brief is to help the Court understand the inevitable and devastating consequences of the appellate court's interpretation of the NPA. First, this brief discusses the numbers of California children whose education, health and lives are at stake in this case. Second, the brief demonstrates how the appellate court's decision will deny California students the right to education guaranteed under California's Constitution and state and federal law, and how it will threaten students' lives. Finally, this brief examines the potential alternatives to allowing trained school personnel to administer medication in the absence of a school nurse and demonstrates how each of these alternatives is inadequate to protect children's rights.

If the Court of Appeal's holding is affirmed, thousands of California parents with children with diabetes will be forced to choose between (1) risking their child's health and safety by sending the child to a school without the authority to administer a simple insulin shot, (2) quitting their jobs and stationing themselves nearby the school at every hour to be immediately available to administer insulin if necessary, or (3) home-

² The only other interest fostered by an interpretation preventing non-nurses from giving medicine to children is the financial interest of the nurses' unions. By restricting the number of people who can administer medicine, these unions insure that their members are more likely to have jobs. But such a pecuniary interest surely cannot stand strict scrutiny when its impact threatens the lives of tens of thousands of children and denies these children their fundamental right to a public education.

schooling their child. No parent should be forced to make such a decision and, indeed, the State Constitution and federal and state disability laws forbid that they be required to do so.

For these reasons, as more fully set forth below, the Court of Appeal's holding is erroneous and should be reversed. The applicable provisions of the NPA and the Education Code should be construed to allow trained personnel who are not licensed nurses to administer medication to children who require it while at school when no nurse is available. Alternatively, the Court should hold that the NPA is unconstitutional as applied to children who need to have medicine administered to attend school.

III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

At the heart of this dispute is the undeniable fact that most California schools do not have a nurse available to administer the insulin medication needed by thousands of children with diabetes. The complications that follow from this deficiency, however, exceed even the dangerous predicament previewed by the Appellants and the lower courts.

A. The Vast Majority Of California Children Requiring Medication While at School, Do Not Attend A School With A Nurse

This case arises in the context of certain California public school children with diabetes who require insulin administration through injections or use of an insulin pump while at school, but the Court's decision here will affect a much larger number of children. Although there is no statewide mechanism to calculate the precise number of California public school children who require (or may require) the administration of medication while at school, children may require that assistance in three types of situations: (1) as part of a scheduled regimen to treat a chronic condition,

(2) in response to emergency medical situations and (3) to treat a temporary condition.

As referenced throughout Appellant's briefs and amply supported by the record, an estimated 14,000 public school students in California have diabetes and require insulin while at school, many of whom require someone to administer the medication to them. 3AA/713.³ However, tens of thousands of children with other common, chronic conditions, also require administration of medication that can easily be provided by trained personnel other than a licensed nurse while at school and are directly and catastrophically impacted by the current interpretation of the NPA. For example, one in six California children, or 1.5 million children, have been diagnosed with asthma, including more than 350,000 who require medication daily to control their asthma,⁴ and an estimated 266,000 school-aged children in California have been diagnosed with Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder and may be required to take medication to remain properly engaged while at school.⁵

In addition to students who require medication at certain regular times throughout the school day, students may also require medication while at school in response to medical emergencies. Students with epilepsy

³ The Appellant's Appendix is cited as “__AA/AA.”

⁴ UCLA Center for Health Policy Research. 2007 California Health Interview Survey. http://www.rampasthma.org/wp-content/uploads/2010/04/RAMP_Asthma_California_Web.pdf.

⁵ A 2005 CDC report estimates that 4.3% of children ages 4 – 17 have been reported to have ADHD and taken medication for the disorder (see Mental Health in the United States: Prevalence of Diagnosis and Medication Treatment for Attention-Deficit/Hyperactivity Disorder, September 2, 2005, <http://www.cdc.gov/mmwr/preview/mmwr/rhtml/mm5434a2.htm>); the 266,000 figure used is based on 4.3% of California's public school students as of the 2009-10 school year.

may experience a condition known as status epilepticus and may require an emergency medication to be administered to prevent severe health risks including brain damage or death. School aged children are also susceptible to severe reactions following certain food allergies and insect bites and may require medication in emergency situations as well. Unlike administering medication to treat chronic conditions, which in some cases can be scheduled at certain specified times, one cannot anticipate when or how frequently medication might be required in these and other emergency medical situations.⁶

Finally, in addition to students who require medication to treat chronic conditions and in emergency situations, other students require medication on a temporary, non-emergency basis to protect against infection or sickness, or treat a temporary pain or illness (*e.g.*, applying antibiotic ointment, eye drops, ear drops, etc.). In contrast to the quantifiable number of students who require medication to treat a specific condition, this last category of students potentially includes every California public school student since all students are susceptible to becoming sick and requiring medication at some point during their time attending school.

The numbers of California students who require medication while at school stand in alarming contrast to the number of California public school nurses. California law does not require schools, or even school districts, to

⁶ Not all medication for chronic conditions may be scheduled at specified times. For example, insulin injections to treat hyperglycemia are frequently needed at unpredictable times in response to varying food intake or activity levels. See 3AA/715.

employ a school nurse.⁷ Although federal guidelines call for a student-to-nurse ratio of 750:1⁸, in 2010, California had only 2,901 nurses working in the State's 10,223 schools serving the State's 6.3 million students – a ratio of over 2,100:1.⁹

According to the California School Nursing Organization and the Association of School Nurses: California ranks behind 40 other states in its student to nurse ratio; there are about 7,000 schools throughout the State with no school nurse (roughly 70% of all California schools) on any given school day; and about half of California's school districts do not have a nurse for the entire district.¹⁰ Given that only 5% of California's public schools employ full-time nurses millions of students attend a school without a full-time nurse.¹¹

This deficiency will likely not be cured in the foreseeable future. Local school districts are in the midst of arguably the most dire budgetary crisis in California state history and cannot afford to use limited and delegated funds to pay full-time school nurses for regular and extracurricular school activities. Over the past two years, California has cut

⁷ See O. Nwabuzor, "Shortage of Nurses: The School Nursing Experience," *ONLINE JOURNAL OF ISSUES IN NURSING*, Vol. 12, No. 2 (February 26, 2007).

⁸ Id.

⁹ Press Release, California Department of Education "State Schools Chief Jack O'Connell Honors School Nurses; Notes Budget Crisis Impact on Nurses in California Schools," (May 11, 2010), <http://www.cde.ca.gov/nr/ne/yr10/yr10rel49.asp>.

¹⁰ Kathy Hundemer, (Government Relations Chair of the California School Nurses Organization), Op. Ed., California's School Nurse Crisis, *LOS ANGELES TIMES*, May 28, 2010.

¹¹ App. Op. Br. at 7.

\$17 billion from K-12 public education,¹² and additional cuts are predicted for the 2011-2012 school year; as of March 2011, 19,000 public school employees statewide had received lay-off notices in anticipation of public education cuts.¹³ Simply stated, there is not enough money for teachers, much less nurses. According to former State Superintendent of Public Instruction Jack O’Connell, “school nursing jobs are often one of the first to be cut by the budget ax.”¹⁴ A survey of school districts found that 48 percent of responding school districts had cut counselors, nurses and psychologists as a result of budget cuts.¹⁵

Compounding the problem is the shortage of nurses generally in our State. The California Board of Registered Nursing estimates that the State’s registered nurse shortage is between 10,294 and 59,027 full-time positions,¹⁶ and the State’s shortage is expected to reach 116,600 by 2020.¹⁷ With this shortage of nurses, it is both unreasonable and untenable to

¹² Press Release O’Connell, supra note 9.

¹³ Smith, J. The Teacher Layoff Epidemic Spreads, THE ATLANTA POST, Mar. 16, 2011, available at <http://atlantapost.com/2011/03/16/the-teacher-layoff-epidemic-spreads/>.

¹⁴ Press Release O’Connell, supra note 9.

¹⁵ Press Release, California Department of Education “State Schools Chief Jack O’Connell Releases School District Budget Cuts Survey Results,” (June 10, 2010), <http://www.cde.ca.gov/nr/ne/yr10/yr10rel71.asp>.

¹⁶ Spetz, Joanne, Ph.D., “Forecasts of the Registered Nurse Workforce in California,” Conducted for the California Board of Registered Nursing, Center for California Health Workforce Studies, University of California, San Francisco, September 20, 2007, <http://www.rn.ca.gov/pdfs/forms/forecasts2007.pdf>.

¹⁷ Governor's California Nurse Education Initiative Annual Report, September 2006, <http://www.labor.ca.gov/pdf/CNEIAnnualReport100406.pdf>.

expect thousands of nurses to be employed by schools that are fiscally unable to hire them even if nurses were available to be hired.

Faced with this tremendous gap between the number of students requiring medication and the number of school nurses, and the impossibility of narrowing the gap in the foreseeable future, many school districts throughout the State have implemented the only viable solution – allowing trained school personnel who are not licensed nurses to administer medication to students who require it while at school when a nurse is not available. This pragmatic solution follows from an interpretation of the relevant statutes that avoids a statutory construction that renders the laws unconstitutional as applied. Importantly, it is also consistent with federal disability and education laws, as well as the settlement agreement between parents of children with diabetes and the State in a prior action.

Prohibiting school districts from relying on this practical solution will result in certain inevitable consequences that violate students’ rights and the law.

B. Many Students Need Assistance To Administer Their Medication

Medical experts have opined that students with diabetes who cannot reliably receive necessary medication risk serious health consequences by attending school. See, e.g., 3AA/627; 3AA/715. Thus, the State’s inability to accommodate students’ disabilities undeniably will put their health at risk. The regular administration of medication is crucial to the health of students with chronic conditions. See 3AA/715 (“The consequence of failing to control blood glucose levels through insulin administration or other appropriate therapies can be severe.”); 3AA/627 (“Not giving insulin in a timely manner . . . can cause the child to experience short term

complications . . . [and] long-term health consequences, including delayed growth and diabetes complications like kidney failure, blindness and heart disease.”).

There are numerous examples of students whose health and safety were risked by the failure to ensure that a trained person was available at the school to administer medication. See 5AA/1256 (untrained school personnel taught student how to unlock insulin pump in violation of parents’ and doctor’s orders); 5AA/1245 (student who also has emotional disabilities was not provided with trained adult supervision of diabetes care at school or on bus to school). For example, students have even been forced to modify physician-mandated insulin protocols to accommodate schools that cannot provide adequate diabetes care. See 3AA/724 (“I am aware of parents who have requested that their child’s treatment regimen be changed . . . because of the refusal of school personnel to administer insulin.”); 3AA/796 (“Parents have asked me, at the urging of their schools, to place their child on an insulin regimen with only two shots a day, so that insulin need not be routinely given at school.”).¹⁸

¹⁸ Self-administration is available to some but not all diabetic students. Older students may be able to self-administer their medication, but children younger than ten may not be ready for full responsibility. See 3AA/718,721. Other students with certain disabilities may never develop the capability to safely administer their own medication. 3AA/718. Further, recently diagnosed students will likely require assistance at the outset. Id. In addition, self-administration is obviously not reasonable for emergency medical treatment (as in the case of a glucagon injection to treat hypo-glycemia or a Diastat injection to stop a cluster of seizures). Id.

C. **Many Children With Diabetes Will Miss School Without Access To Medication**

Many students who require but cannot receive their medication must miss school. The record includes evidence of students being excluded from the public school system as a result of the school district's failure to ensure that the students' medication would be properly administered. See 3AA/676 (parents forced to home-school student because the school required the mother take primary responsibility for the administration of insulin at school because there was only a nurse available two days a week); 5AA/1204 (school principal told mother that her child was not allowed to attend school when her blood sugar level was above a certain level and parents were forced to keep student home from school for several days).¹⁹

Students also miss class time waiting for medication. For example, students have been excluded from class by being forced to wait for a parent or off-site nurse to arrive to administer medication. See 5AA/1205-06 (student missed lunch with her classmates, recess, and so much class time that she had to complete additional homework assignments most days of the week); 5AA/1245-46 (child "missed opportunities to learn every time she feels poorly as a result of poor management of her diabetes at school"). For students with diabetes, delayed administration of insulin can also exclude students from learning even when in the classroom. See 3AA/627 (delays in insulin administration can result in prolonged hyperglycemia

¹⁹ Students with other conditions are just as likely to miss school if they are denied their medications. For example, 11% of California's school-age children who have been diagnosed with asthma (134,000) miss five or more days of school per year as a result of their condition where they do not receive proper and timely medication. See http://www.childrenow.org/index.php/learn/facts_asthma.

which can result in a child's inability to focus, see the board, pass a test or remember what is being taught).

D. The Court Of Appeal's Holding Has Broad Consequences

1. The Holding Reaches Beyond Public Schools

The lower court's erroneous reconciliation of the statutes at issue is so broad that it has the potential to negatively affect medication administration outside of public schools as well. For example, children in group homes, foster homes and other child care facilities could be denied access to necessary medication. Nurses in licensed child care centers and family child care homes throughout California are rare. Currently, child care providers can administer numerous medications if they follow specific guidelines. Cal. Health & Safety § 1596.797; Cal. Health & Safety 1596.798; Cal. Code Regs. tit. 22, § 101226.

2. The Holding Reaches Beyond The School Day And Schoolhouse

Ensuring that every public school that enrolls a student who needs, or may need, medication while at school employs a full-time nurse will not be sufficient. Even if a school employs a nurse, students will be excluded from other parts of public education, like field trips and extracurricular activities taking place after school and off-campus. Employed nurses can be absent or unavailable on occasion or might be required to attend to multiple students in different locations at the same time. Further, students who require medication must be allowed to participate in extracurricular activities on the same basis as students not requiring medication. Hartzell v. Connell, 35 Cal. 3d 899, 909 (1984) (extracurricular activities "constitute an integral component of public education"). Many of these activities take place after school and off-campus. For these reasons, unlicensed, trained

school personnel would still need to administer medication to students while at away sports competitions, field trips, during after school practices and on the bus.

3. The Holding Ignores Medical Emergencies

In addition to students who require medication at certain regular times throughout the school day, students may also require medication while at school in response to medical emergencies. For example, students with epilepsy can experience a condition known as status epilepticus and may require emergency medication to prevent health risks including brain damage or death.²⁰ School-aged children are also susceptible to severe reactions following certain food allergies and insect bites and may require medication in emergency situations as well. Unlike administering medication to treat chronic conditions, which in some cases can be scheduled at certain specified times,²¹ one cannot anticipate when or how frequently medication might be required in these and other emergency medical situations.

4. The Holding Potentially Reaches Every Child

In addition to students who require medication to treat chronic conditions and in emergency situations, other students require medication on a temporary, non-emergency basis to protect against infection or

²⁰ Status epilepticus is a life-threatening condition in which the brain is in a state of persistent seizure. Traditionally, it is defined as one continuous unremitting seizure lasting longer than 30 minutes, or recurrent seizures without regaining consciousness between seizures for greater than 30 minutes. See <http://www.epilepsyfoundation.org/about/types/types/statusepilepticus.cfm>.

²¹ Not all medication for chronic conditions may be scheduled at specified times. For example, insulin injections to treat hyperglycemia are frequently needed at unpredictable times in response to varying food intake or activity levels. See 3AA/715.

sickness, or treat a temporary pain or illness. In contrast to the quantifiable number of students who require medication to treat a specific condition, this last category of students potentially includes every California public school student since all students are susceptible to becoming sick and requiring medication.

E. California Parents Must Make Choices Detrimental To Their Families

The record includes numerous examples of parents who were required to attend to their children's medical needs at school because the school district would not provide someone to administer a child's medication. One mother was told that because she was "'just a stay at home mom,' there was no reason that [she] could not go to school every day to administer insulin." 3AA/673; see also 3AA/637 (parent of six-year-old child with Type 1 diabetes told that no nurses were available at the school, so if child needed insulin, parent would be responsible for administration); 5AA/1243 (parent of eleven-year-old child told that she or an individual designated by her family would have to be available to administer insulin to daughter if needed); 5AA/1202-03 (mother of seven-year-old told that either mother or a family member would have to go to the school to administer insulin, and that the school would only dial 911); 5AA/1292-93 (mother of six-year-old forced to make daily trips to school because no staff member would administer insulin to her child).

The record also includes examples of parents who were forced to quit their jobs or could not seek work. See 5AA/1244 ("I had to quit my job that fall because I was unable to respond to calls from K.C., and I was not able to leave my patients to go to school when needed"); 3AA/641 ("To this date, I am unable to seek employment because I have no clear

assurances that school personnel will administer insulin to my child at unscheduled times.”); 3AA/678 (mother unable to earn income in order to be constantly available to go to school to administer insulin).

F. Children With Diabetes Will Not Learn To Live With Their Medical Condition

A potentially long lasting consequence of the holding will be the psychological effect on children with diabetes. A key component of treating any child with any disease or disability is teaching them that they can equally participate in society with their peers and, moreover, helping them learn to live accordingly.²² Requiring students to miss educational opportunities and social experiences although they can fully function normally like their childhood peers undermines this goal. If the Court of Appeal's holding is affirmed, our children with diabetes will suffer long-term in their development and they will not fully learn how to live normal lives with their diabetic condition. Compounding this concern is the rising rate of diabetes in children.²³

IV. ARGUMENT

A. This Court Reviews The Interpretation Of The NPA De Novo And Should Construe It, If Reasonable, To Avoid A Constitutional Issue

Issues of statutory interpretation and constitutional questions are reviewed *de novo*. In re Conservatorship of Whitley, 50 Cal. 4th 1206, 1213-14 (2010) (statutory interpretation); Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Auth., 44 Cal. 4th 431, 448-49 (2008) (finding courts exercise independent judgment in matters involving

²² See, e.g., Jean Betschart Roemer, ADA Guide To Raising A Child With Diabetes, (3rd Ed., 2011)

²³ Children and Diabetes-More Information, Center for Disease Control, <http://www.cdc.gov/diabetes/projects/cda2.htm>.

constitutional interpretation); Ramirez v. Yosemite Water Co., Inc., 20 Cal. 4th 785, 794 (1999) (statutory construction is a question of law). In carrying out that function, this Court has long held that “[o]ur common practice is to ‘construe[] statutes, when reasonable, to avoid difficult constitutional questions.’” In re Smith, 42 Cal. 4th at 1269 (citing Le Francois v. Goel, 35 Cal. 4th 1094, 1105 (2005)). See also Myers v. Philip Morris Co., 28 Cal. 4th 828, 846-47 (2002) (“An established rule of statutory construction requires us to construe statutes to avoid ‘constitutional infirmities.’”).

Appellants have done a masterful job demonstrating that the NPA and the Education Code can reasonably be interpreted in a manner that permits public schools to allow trained personnel to administer medicine to students who need it when a licensed nurse is not available. *Amici Curiae* will not repeat those arguments or belabor them other than to note, through incorporation by reference, that because Appellants have demonstrated a reasonable interpretation of the NPA, to the extent that *Amici Curiae* demonstrate below that the contrary interpretation proffered by Respondents creates a constitutional infirmity, Appellant’s interpretation should be given preference to avoid the constitutional issue.²⁴

²⁴ Although none of the parties previously raised the constitutional question, the failure to raise the argument below is no impediment to this Court’s *de novo* consideration of the issue. See, e.g., Hale v. Morgan, 22 Cal. 3d 388, 394 (1978) (holding a “litigant may raise for the first time on appeal a pure question of law” and noting that “courts have several times examined constitutional issues raised for the first time on appeal, especially when... important issues of public policy are at issue.”); People v. Hines, 15 Cal. 4th 997, 1061 (1997) (allowing a Constitutional argument not raised at trial).

B. Refusing To Allow Trained School Personnel To Administer Medication When A Nurse Is Unavailable Denies Students The Fundamental Right To A Free And Non-Discriminatory Education Guaranteed By The California Constitution To All Californians

1. The Right To Education Is A Constitutionally Protected Fundamental Right In California And Any Impingement On That Right Is Subject To Strict Judicial Scrutiny

The right to a public education is enshrined in California’s Constitution and guaranteed to all Californians. Cal. Const. art. IX, § 5 (“The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district”). It is unquestionably a fundamental right. Serrano v. Priest, 5 Cal. 3d 884, 608-09 (1971) (Serrano I) (“[T]he distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest.’”). This Court has repeatedly affirmed that the right to education is a fundamental interest protected by California’s Constitution and has zealously guarded that right against any infringement. See, e.g., Butt, 4 Cal. 4th at 683; Serrano II, 18 Cal. 3d at 766.

Under California law, “denials of basic educational quality are subject to strict scrutiny.” Butt, 4 Cal. 4th at 692. This fundamental right in California is so strong that any denial of the right is subject to strict scrutiny.²⁵ Id. See also Hernandez v. City of Hanford, 41 Cal. 4th 279, 299

²⁵ A constitutional violation may arise by less than a denial of the right to an education in its entirety; a plaintiff need only demonstrate that he was denied an education “substantially equivalent” to that provided elsewhere in the State to prevail on a claim that his right to education has been violated. See Serrano I, 5 Cal. 3d at 589 (claim was not that certain students received no funding for their education, but only that their funding was less than what other students received); Butt, 4 Cal. 4th at 703-704 (refusing to allow a school district to reduce the number of days in its academic year by less than one-fifth of the number of days than other schools). Indeed, the mere possibility of the denial or limitation of a right to basic educational equality has been enough for this Court to find a

(cont’d)

(Cal. 2007) (in cases “touching on ‘fundamental interests,’” courts must adopt “‘an attitude of active and critical analysis, subjecting the [law] to strict scrutiny.’”). Under strict scrutiny, “*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.” Serrano II, 18 Cal. 3d at 368; Serrano I, 5 Cal. 3d at 597.

Concomitantly, the State is constitutionally **mandated** to provide **free** public schools for all children.²⁶ Cal. Const. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”); Cal. Const. art. I, § 26 (“The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”). The Constitution also prohibits unlawfully

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constitutional violation. See Hartzell, 35 Cal. 3d at 904 (finding that a \$25 fee for extracurricular activities violate the free-school guarantee, even though “[t]here was no evidence that any student was prevented from [participating in extracurricular activities] because of the fees.”).

²⁶ To be certain, the Court may find a violation of the right to education even where State action is the indirect cause of the violation and even where the State’s inaction may cause the violation. For example, in Serrano I, it was not that the State established disparate per pupil funding levels among school districts – in fact, the State actually provided supplemental funds to help address inter-district funding disparities. Serrano I, 5 Cal. 3d at 593. Still, it was enough that the State’s school finance system allowed the per student funding disparities for this Court to find a constitutional violation that the State was obligated to correct. Id. at 614-15; see also Butt, 4 Cal. 4th at 681 (“Because access to a public education is a uniquely fundamental personal interest in California, our courts have consistently found that the State charter accords broader rights against State-maintained educational discrimination than does federal law. Despite contrary federal authority, California constitutional principles require State assistance to correct basic “interdistrict” disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.”).

Thus, while Respondents assert that “[t]he license matters” (Resp. Br. at 44 n.15), in fact the Legislature already has concluded that unlicensed personnel may administer medicine, and specifically insulin, because such medicines do not require any specialized training or knowledge to administer. In fact, so long as administered consistently with a physician’s instructions, administering insulin or virtually any other medicine can be done quite safely. (See Appellants’ Op. Br. at 9-10 and 19-25.) Perhaps the best evidence that a “license does [not] matter,” is that while Respondents ominously argue that “[insulin] is so dangerous and requires substantial scientific knowledge to safely administer” (Resp. Br. at 5), the Legislature has expressly concluded that elementary school children can self-administer insulin. Cal. Educ. Code § 49414.5. If a seven year-old can administer insulin to themselves, then respectfully the drug cannot “require substantial scientific knowledge to safely administer.” (Resp. Br. at 17.)

As Respondents cannot establish that it is necessary to construe the NPA in the fashion urged in the Court of Appeal, much less that it furthers a compelling interest, Section 2725 of the NPA should be held unconstitutional to the extent it precludes school children who need medicine to attend school from receiving medicine from trained school personnel who are not licensed nurses.

C. **Alternatives To Allowing Trained School Personnel Who Are Not Licensed Nurses to Administer Medication Are Inadequate**

Although *Amici Curiae* have demonstrated that there is not, and cannot, be a compelling interest in enforcing Section 2725 as construed by the Court of Appeal, it is worth analyzing whether there are any reasonable alternatives that would allow Respondents’ construction to stand without causing untold harm to tens of thousands of California school children.

Amici Curiae respectfully submit that there are three potential alternatives to allowing trained school personnel who are not licensed nurses to administer medication to children while at school: (1) require children to self-administer the medication; (2) require parents to come to school or to identify a family member or friend (other than school personnel) to administer the medication; or (3) ensure that every school that enrolls a student who requires medication administration while at school or at school-related activities employs a full-time nurse and back-up nurse for when the full-time nurse is unavailable. As shown below, none of these alternatives are viable.

1. **Many Children Are Unable To Self-Administer Medication**

In California, children may enroll in public school at age five, although certain children with disabilities may begin attending public school as young as three years old. See Cal. Educ. Code § 8235(a). At some point, some students may be able to self-administer their medication, but students as young as five and three years old can hardly be expected to safely administer their own medication. See 3AA/718, 721. Further, certain students with disabilities may never develop the capability to safely administer their own medication. See 3AA/718. Those students newly diagnosed with a chronic condition will also likely require assistance for a time while learning to manage the disease. Id. In addition, self-administration is most certainly not a reliable alternative for situations in which a child requires emergency medical treatment (as in the case of a Diastat injection to stop a cluster of seizures). Id. Therefore, self-administration is not a viable alternative.

2. **Requiring Parents to Assume Responsibility For Administering Medication Violates Disability Laws And California's Free-School Guarantee**

The second alternative is to require parents, other family members or friends to administer medication to children who require it while at school. However, this alternative misallocates the State's responsibility under state and federal disability law and violates California's free-school guarantee.

State and federal disability rights laws require that the State make reasonable accommodation for persons with disabilities and that the State provide services and support to students with disabilities. Cal. Educ. Code § 56001(a). Requiring a family member or friend to come to the school to administer medication to a student with a disability misallocates the responsibility for making public education accessible. It is the obligation of the State, not of the individual with a disability or her family, to provide accommodations, support and services under state and federal disability law. See, e.g., Putnam v. Oakland Unified Sch. Dist., No. C-93-3772W, 1995 WL 873734 at *12 (N.D. Cal. Jun. 9, 1995) ("It was not Putnam's burden to find a way for the District to make a school program accessible to her. Rather, it was the District's burden to offer her either a fully accessible school or a school whose program would be readily accessible to her by means such as the provision of aides and reassignment of classes to accessible facilities."). Providing accommodation for any disability should not be a condition of a child attending school, regardless of a family's willingness to bear the burden..

Also, requiring parents to be available to administer medication to a student could place a financial burden on certain families in violation of California's guarantee to a free and appropriate education. The California Constitution requires the State to "provide for a system of common schools

by which a free school shall be kept up and supported in each district” Cal. Const., art. IX, § 5; see also Butt, 4 Cal. 4th at 680. As this Court has said, “[i]n guaranteeing ‘free’ public schools, article IX, section 5 fixes the precise extent of the financial burden which may be imposed on the right to an education - none.” Hartzell, 35 Cal. 3d at 912; see also Cal. Educ. Code § 56031 (special education “means specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs”).

As this Court carefully explained in Hartzell:

The free school guarantee reflects the people’s judgment that a child’s public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and nonneedy families.

The free school guarantee lifts budgetary decisions concerning public education out of the individual family setting and requires that such decisions be made by the community as a whole. Once the community has decided that a particular educational program is important enough to be offered by its public schools, a student’s participation in that program cannot be made to depend upon his or her family’s decision whether to pay a fee

Hartzell, 35 Cal. 3d at 911-12.

The record in this case cites numerous examples of parents who were required to attend to their children’s medical needs at school because the school district would not provide someone to administer a child’s medication. One mother was told that because she was “‘just a stay at home mom,’ there was no reason that [she] could not go to school every day to administer insulin.” 3AA/673; see also 3AA/637 (parent of six year-old child with Type 1 diabetes told that no nurses were available at the school, so if child needed insulin, parent would be responsible for administration.); 5AA/1243 (parent of eleven year-old child told that she or

an individual designated by her family would have to be available to administer insulin to daughter if needed.); 5AA/1202 (mother of seven year-old told that either mother or a family member would have to go to the school to administer insulin, and that the school would only dial 911); 5AA/1292-93 (mother of six year-old forced to make daily trips to school because no staff member would administer insulin to her child).

The record also includes examples of parents who were forced to quit their jobs or could not seek work. See e.g., 5AA/1244 (“I had to quit my job that fall because I was unable to respond to calls from K.C., and I was not able to leave my patients to go to school when needed”); 3AA/641 (“To this date, I am unable to seek employment because I have no clear assurances that school personnel will administer insulin to my child at unscheduled times.”); 3AA/678 (mother unable to earn income in order to be constantly available to go to school to administer insulin).

Not only does placing the responsibility of administering medication on a child’s family violate the free-school guarantee, but it could also discriminate among students on the basis of wealth. More affluent families may be better able to afford to have a parent or other family member available to come to a child’s school on a daily basis to administer medication, while less affluent families or single-parent families where the parent has a full-time job would not be able to do so. In this way, requiring the family to be responsible for administering medication while at school could condition a child’s health, welfare and ability to attend school on family affluence. This Court has found such a result violates the students’ right to an education under California’s Constitution. See Serrano I, 5 Cal. 3d at 614 (holding that the school funding system, which conditioned the full entitlement to an education on the affluence of a student’s family, was

unconstitutional). For these reasons, requiring a child's family to assume responsibility for the students' medication administration – a practice widely used throughout the State – violates students' rights and California law.

Even if shifting the burden to parents was legal, it would simply not work as a practical solution for all children, because many parents have full-time jobs and do not work in sufficient proximity to their child's school to allow them to be primarily responsible for administering their child's medication. This solution would also prohibit students who require medication from attending field trips and traveling away from the school for extracurricular activities (e.g., sports matches) when doing so would place them out of reach of a parent who was responsible for administering their medication.

3. Providing A Full-Time Nurse At Every School Is Not Realistic And Would Not Adequately Address The Problem

The final alternative to allowing trained school personnel who are not licensed nurses to administer medication to students who require it during school hours is to ensure that every public school that enrolls a student who needs, or may need, medication while at school employs a full-time nurse. As demonstrated above, this alternative is not fiscally feasible in California for the foreseeable future. Nor is it realistic in light of the growing shortage of licensed nurses, which would prevent schools from hiring sufficient nurses even if the schools otherwise had sufficient funds. And, in any event it is not an adequate remedy as such relief would still deny students with disabilities the full benefit of the school program available to their non-disabled peers.

Currently, only 5 in every 100 public schools in California employ a full-time nurse. 6AA/1399. Over the past two years, public education in California funding has been reduced by \$17 billion, and additional cuts are predicted for the 2011-2012 school year (as of April 2011, 19,000 public school employees statewide had received lay-off notices in anticipation of public education cuts).²⁹ Even if money were not an issue, given California's nursing shortage, the possibility of having a full-time nurse at every public school is not feasible for the foreseeable future.

But assuming for argument's sake that California had the money to hire a full-time nurse at every school and also had a sufficient number of qualified nurses to be hired – two conditions that are impossible at least for the foreseeable future – practical considerations would still require allowing trained school personnel who are not licensed nurses to administer medication. First, even if every school employed a nurse, the nurse might be absent on occasion, be away from campus temporarily, or might be attending to a student at another part of campus when another student required medication on a scheduled or emergency basis. Further, as discussed above, students who require medication must be allowed to participate in extracurricular activities on the same basis as students not requiring medication. Many of these activities take place after school and off-campus. Trained school personnel who are not licensed nurses would still need to administer medication to students participating in sports competitions, on field trips, during after school practices and on the bus going to and from school. Upholding the laws that prohibit discrimination against persons with disabilities and protecting the right to a free and

²⁹ Smith, supra note 13.

appropriate education require that students who require medication while at school be able to receive it at all times, not only when a scheduled nurse is available. Therefore, even if a school nurse were available at every campus, other trained school personnel would still need to be able to administer medication when the nurse was not available in order to protect students' rights.

D. Construing The Statutes Consistent With The State Constitution Would Also Conform To Federal And State Laws Protecting Disability Rights

Properly construing the Nursing Practice Act and the Education Code results in a statutory interpretation that is not only consistent with the State Constitution but also consistent with federal and state disabilities laws.

1. Federal Disability Laws

Throughout the past forty years, Congress has made ending the exclusion of persons with disabilities a priority and a guiding principal in extending civil rights to persons with disabilities. Before Congressional intervention in the 1970s, some state laws condoned and permitted the exclusion of students with disabilities from public schools. See, e.g., Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 282 (E.D. Pa. 1972) (describing a state law that excluded students deemed "uneducable and untrainable" by reason of a mental disability from public schools); Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 869 (D.C.D.C. 1972) (describing the exclusion from public schools of an estimated 12,340 handicapped children within the District of Columbia). In response to this discrimination, Congress passed a number of laws to ensure that persons with disabilities would not be excluded from public life. Significantly, in the Rehabilitation Act of 1973, Congress provided: "No otherwise qualified handicapped individual in the United States . . . shall, solely by

